

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

California Independent System Operator Corporation)
Docket No. ER99-2730-000)
)
)

**ANSWER OF THE
CALIFORNIA INDEPENDENT SYSTEM OPERATOR
CORPORATION TO MOTIONS TO INTERVENE, AMENDMENTS AND
SUPPLEMENT TO SUCH MOTIONS, COMMENTS AND PROTESTS**

On April 30, 1999, the California Independent System Operator Corporation (“ISO”) filed Amendment No. 16 to the ISO Tariff,¹ implementing the Grid Management Charge (“GMC”) to be effective July 1, 1999. Pursuant to Rule 213 of the Commission’s Rules of Practice and Procedure, 18 CFR § 385.213 (1998), the ISO hereby submits its Answer to the Motions to Intervene, Amendments and Supplement to such Motions, Comments and Protests submitted in response to the April 30th filing.

The ISO does not oppose any of the requests to intervene and, as explained below, does agree that one change should be made to clarify the Tariff. With respect to the other comments and protests, however, the ISO believes they should be rejected because the rate as filed is just and reasonable. The protests to the ISO’s statement regarding the ISO’s intent to seek surcharges if refunds are ordered should also be rejected. The law is clear that

¹ Capitalized terms not otherwise defined herein are defined in the Master Definitions Supplement, Appendix A to the ISO Tariff.

such surcharges are not prohibited if adequate notice is given and, through this and earlier filings, the ISO has given such adequate notice.

I. Introduction

A. Amendment No. 16

As explained in the transmittal letter that accompanied Amendment No. 16 (“Transmittal Letter”), that filing was the product of a lengthy process commencing as the result of the 1998 GMC settlement. The process was designed to examine whether at this time the GMC can and should be unbundled into separate rates for different ISO services. The Transmittal Letter explained that although the ISO had facilitated, over the past year, an open and extensive stakeholder process to determine which of the ISO’s functions, if any, should be separately priced, to date stakeholders have been unable to reach a consensus on new unbundled rates. The Transmittal Letter further explained that the amount of data collected and analyzed in the short time the ISO has been in operation was inadequate to determine a set of properly unbundled rates. Based on the overwhelming and vigorously presented recommendation of the stakeholders,² the ISO’s Governing Board voted to continue the currently effective GMC formula and assessment provisions through December 31, 2000.

The Transmittal Letter explained that this decision was considered over the course of several ISO Governing Board meetings and was based on the following principal factors:

² Several stakeholders did not concur in the recommendation.

- The more complex approaches to unbundling favored by a number of stakeholders would require complex changes to the ISO's computer software to track and bill charges. Such changes could not be developed, installed, tested, and made effective before January 1, 2001, unless critical software projects (including Firm Transmission Rights and Ancillary Services Redesign) were set aside.
- Although not the only supportable result, the methodology included in Amendment No. 16 (which is the same as the currently effective methodology) was determined to be generally consistent with the available cost support data, particularly since it would remain in effect for a relatively limited duration until software revisions could be accommodated and a further unbundling study is completed.
- The vast majority of stakeholders supported continuing the currently effective GMC rate methodology for this 18-month transitional period.

In light of these considerations, the Transmittal Letter explained that the ISO believed that the current GMC rate formula remained within the "zone of reasonableness." Amendment No. 16 to the ISO Tariff was designed to implement the continuation of the current GMC rate methodology through December 31, 2000, by changing references in Schedule 1 of the ISO Tariff that refer to the effective period of that rate. The ISO therefore requested that the Commission (a) accept the filing, (b) find the proposed GMC rate formula and assessment provisions to be just and reasonable, and (c) permit the proposed Tariff changes to go into effect upon the requested effective date without being subject to refund. The ISO also requested, in the alternative, that if the Commission did not accept the rate as filed and ordered refunds to some customers, it be permitted to surcharge other customers to recover the refunded amounts.

B. Interventions

Twenty-three timely and one out-of-time motions to intervene were filed in this proceeding. Twenty-one of the filings either supported or did not oppose the request for the extension of the GMC formula included in the filing. Several of those interventions, while supporting the filing, opposed the request for surcharge authority or opposed the use of the cost support provided in the filing. The Western Power Trading Forum (“WPTF”) filed the only protest to the extension of the GMC formula, although two members of that group filed comments joining the protest. Finally, The Cities of Redding and Santa Clara, California and the M-S-R Public Power Agency (“Cities/M-S-R”) filed a “Supplement” to their joint motion to intervene, identifying what they believed was an apparent error in the GMC filing.

II. Answer to Filings³

A. Response to Comments Opposing Request for Surcharge Authorization

As explained in the Transmittal Letter at 13-14, the ISO requested surcharge authorization if the Commission orders refunds because it has no

³ There is no prohibition on the ISO’s responding to the comments in these pleadings. The ISO is entitled to respond to these pleadings and requests notwithstanding the label applied to them. *Florida Power & Light Company*, 67 FERC ¶ 61,315 (1994). In the event that any portion of this answer is deemed an answer to protests, the ISO requests waiver of Rule 213 (18 C.F.R. §385.213) to permit it to make this answer. Good cause for this waiver exists here given the nature and complexity of this proceeding and the usefulness of this answer in ensuring the development of a complete record. *See, e.g., Enron Corporation, et al.*, 78 FERC ¶ 61,179 at 61,733, 61,741 (1997); *El Paso Electric Company, et al.*, 68 FERC ¶ 61,181 at 61,899 & n.57 (1994).

alternative revenue sources. If the ISO must make refunds, it must collect those funds from others or cease to perform budgeted tasks.

Several parties submitted comments opposing the ISO's conditional request for surcharge authorization.⁴ Two basic arguments were made. The first was that surcharge authorization would constitute retroactive ratemaking. The second was that the surcharge request was premature and would lead to market uncertainty.⁵ Neither argument should be accepted.

⁴ California Municipal Utilities Association ("CMUA"); Cities/M-S-R; Energy Producers and Users Coalition and Cogeneration Association of California ("EPUC/CAC"); The Metropolitan Water District of Southern California ("Metropolitan"); Modesto Irrigation District ("MID"); Northern California Power Agency; Transmission Agency of Northern California ("TANC"); Western Area Power Administration.

⁵ This latter argument was sometimes presented in several different forms, but the principal concern was that the possible surcharge level was uncertain because of the stage of the proceeding. This in turn would cause market uncertainties or collection problems for the ISO's customers. See, e.g., CMUA Motion to Intervene, Comments and Limited Protest at 5; Cities/M-S-R Motion to Intervene, Comments and Protest at 8.

Two other arguments that were raised can be dismissed as baseless. First, the EPUC/CAC argued at page 9 that the ISO should not be allowed to collect a surcharge because it was somehow responsible for the delay in completing the unbundling study. That is wrong. As the Amendment No. 16 filing demonstrates, the unbundling study was in fact completed, but neither the stakeholders nor the ISO believed that the results were acceptable because of the limited amount of data and experience available when the study was performed. Transmittal Letter at 5, 9-11, 12-13. There are many reasons why no further unbundling has been proposed at this time, as explained in the Transmittal Letter, and none of those reasons relates to delays or problems caused by the ISO. Second, Metropolitan argued that proposing a surcharge is inconsistent with the settlement on the GMC. The rate provisions of the GMC settlement covered only the period through 1998. The Commission has determined that the filings since then, including Amendment No. 16, are not to be considered extensions of those aspects of the settlement, but rather separate, independent filings that seek to extend the existing GMC formula. *California Independent System Operator Corp. et al.*, 87 FERC ¶ 61,023 (1999); *California Independent System Operator Corp. et al.*, 85 FERC ¶ 61,433 (1998). The Commission has established a refund effective date of June 7, 1999. Accordingly, any refunds ordered or surcharges imposed would be outside the period during which the settlement rate applied.

The parties citing the rule against retroactive ratemaking ignore the fact that the “filed rate doctrine simply does not extend to cases in which buyers are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service.” *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992). All customers have been on notice from as early as January 22, 1999, that if the ISO were required to make refunds to some customers, it intended to recover those amounts from other customers.⁶ And, if they were not on notice at that time, then clearly they will have been on notice from the date of the filing of Amendment No. 16, which was April 30, 1999. This date is well in advance of the possible effective date for refunds, June 7, 1999, established by the Commission’s order in Docket EL99-47-000. Thus, any surcharge imposed would not constitute impermissible retroactive ratemaking.⁷

With respect to the concern relating to the amorphous nature of the request for surcharge authorization, the ISO recognizes that it has not yet specified the precise features of the surcharge. This is because, until the Commission determines whether there will be a refund and, if so, to which customers and in what amounts, it is impossible to define the surcharge with specificity. The exact nature of the surcharge thus will be defined in connection with the proceeding determining the refund. The ISO is not yet seeking specific

⁶ See *Request for Rehearing of California ISO*, Docket No. ER99-473-000 at 7 (Jan. 22, 1999).

⁷ See *Transwestern Pipeline Co.*, 73 FERC ¶ 61, 091 at 61,276-77 (1995); *New England Power Co.*, 69 FERC ¶ 61,376 (1994).

approval of an actual surcharge amount, but rather is putting all customers on notice that it will impose a surcharge if refunds are ordered. Such notification is not premature, but essential to allow the ISO to collect the necessary funds. The ISO renews its request that the Commission clarify that it be permitted to surcharge customers in the event that the Commission ultimately orders refunds of amounts collected through the GMC.

B. Response to Comments Relating to Cost Data

Two parties raised concerns with respect to the cost data submitted in support of Amendment No. 16, indicating that their support for the filing should not be construed as supporting the cost data with respect to any future unbundling proposals.⁸ The ISO concurs with that assessment. The data submitted to support Amendment No. 16 are the data that are currently available. They may or may not be relied upon to support future filings. As noted in the filing itself, further studies may in fact yield different results with respect to the GMC.⁹ Any future filing thus should be evaluated on its own merits and no party should be bound to adhere to the current cost support with respect to future filings.

⁸ Motion of Cities/M-S-R at 7-8; Motion for Intervention and Comments of Sacramento Municipal Utility District at 4-5.

⁹ See, e.g., Transmittal Letter at 11 and footnote 3.

C. Response to WPTF's Comments

WPTF and two of its members joined in a single protest of the filing.¹⁰ The protest duplicates many of the same arguments that Enron and WPTF have been making opposing the GMC in earlier proceedings.¹¹ Basically WPTF argues that the volume exclusion for Existing Contracts is unduly discriminatory and anticompetitive.¹² The Transmittal Letter and cost data submitted in support of Amendment No. 16, however, demonstrate that there is no basis for such a claim.¹³ Instead the materials show that in light of the totality of the circumstances, the proposed GMC should be found to be just and reasonable.¹⁴ See Transmittal Letter at 10-13. The ISO believes that in the unique circumstances applicable here (software and data limitations, temporary and

¹⁰ The members specifically supporting the filing were Enron Energy Services Power, Inc. ("Enron") and Coral Power, L.L.C.

¹¹ See *Request for Rehearing of Enron*, in Docket No. ER99-473-000 (Jan. 22, 1999); *Western Power Trading Forum v. California Independent System Operator Corp.*, 87 FERC ¶ 61,016 (1999).

¹² WPTF Motion at 8-11.

¹³ WPTF claims that it is "telling" that the ISO did not include any cost support for the GMC rate to non-incumbents while it did do so for Existing Contracts. WPTF Motion at 10. In fact, the ISO's filing did include such cost support. Non-incumbents are included in the group of customers that do not include Existing Contracts. They are included in the volumes associated with the IOU service territories and, as such, the cost support for those volumes applies to the non-incumbent volumes. See Attachment C to Transmittal Letter at 7-8.

¹⁴ The ISO takes exception to WPTF's characterization of its filing as neither credible nor serious (WPTF Motion at 7 and 8). The ISO's filing provides the basis for the Commission to determine that the proposal is just and reasonable. All but three intervening parties have supported it. The fact that other customers do not accept the proposal does not mean the proposal is not serious or credible. As explained in the Transmittal Letter, the ISO Board seriously considered all positions and determined that in light of the circumstances, this was the appropriate path to follow. The proposal represents a reasonable solution to the unbundling issues at this time.

transitional nature of rate, available cost support, and significant stakeholder support), the Commission could make the determination that the rate is just and reasonable now without a hearing.¹⁵

At the same time, the ISO recognizes that the Commission may determine that a hearing is required. In such an event, the ISO requests that the Commission specify the precise parameters and limits of such a hearing. Such a hearing should be limited to the determination of whether the GMC could be unbundled into separate rates for different ISO services and the resulting allocation of costs to various customer classes, and whether the level of newly-incurred operating costs was appropriate. The hearing may not, however, examine the underlying infrastructure costs of the ISO, which were accepted by all parties – including members of WPTF – in the initial GMC settlement.¹⁶ With

¹⁵ If it did so, then there would be no refund requirement. Or, if the Commission after hearing determined that the ISO's proposal was acceptable, then there would also be no refund requirement. Thus, WPTF's extended argument objecting to the request that the Commission accept the proposal as filed (WPTF Motion at pages 13-17) is meaningless. The ISO recognizes that if the Commission sets the matter for hearing, it will be subject to refund as noted in the order in Docket No. EL99-47-000.

¹⁶ *California Independent System Operator Corp.*, Docket No. ER98-211-000, *et al.*, Settlement Agreement, ¶ 7, *approved*, 83 FERC ¶ 61,247 (1998). WPTF (at footnote 4 of its Motion) argues that it is no longer bound by that settlement because the ISO failed to file a new GMC in October 1998, to be effective January 1999. It is wrong. The settlement did not require the ISO to file an unbundled GMC, as WPTF implies, but only to initiate a proceeding to examine the GMC. The ISO did make a filing in October 1998, which the Commission determined should be treated as a Section 205 filing. *California Independent System Operator Corp., et al.*, 85 FERC ¶ 61, 433 (1998). As a result, regardless of the characterization of the filing by WPTF or the ISO, the undisputed fact is that WPTF obtained the precise *quid pro quo* it had bargained for under the settlement. WPTF cannot be heard to complain now that it did not receive the benefit of the bargain.

WPTF also implies that the ISO is not living up to the settlement because it is "put[ting] off yet again any substantive consideration of its GMC." (WPTF Motion at footnote 4.) Such an argument is absurd. The ISO has made its filing and included (footnote continues on next page)

these as the appropriate parameters, the ISO would be amenable to a hearing if the Commission determined it could not approve the GMC solely on the basis of the ISO's filing.

D. Supplemental Comments

On May 28, 1999, Cities/M-S-R filed a supplement to its motion to intervene, and on June 3, 1999, MID and TANC each filed an amendment to their motions. These supplemental filings argued that one tariff sheet included with Amendment No. 16 was incorrect, because Sheet No. 375 referenced the original GMC level (\$0.7831/MWH), rather than the currently effective level of \$0.7781/MWH. The intervenors recommended that the reference be corrected to reflect the current rate.

Although the tariff sheet is not incorrect (because the reference on Sheet No. 375 was to the original GMC level, and that reference was not supposed to change from year to year), the ISO realizes that several parties may have been confused by the reference on Sheet No. 375 to the original GMC level. The ISO therefore proposes to avoid confusion by modifying Sheet No. 375. The modification would delete the following confusing sentence: "The Grid Management Charge will be \$0.7831/MWH, as of March 31, 1998." The ISO

arguments and data in support. That is precisely what it was required to do under the settlement. It has lived up to its part of the bargain. The ISO, like any entity filing before the Commission, has requested that the Commission approve the filing. Merely because the ISO has made such a request does not mean that the ISO is seeking to avoid Commission review. It will be up to the Commission to determine whether the filing can be approved or whether a further investigation is required. For WPTF to imply that by requesting Commission approval the ISO is seeking to "put off" the investigation and thus avoid its settlement obligation is baseless.

agrees to make that modification in a compliance filing to be submitted in this docket.

III. CONCLUSION

For the foregoing reasons, the Commission should accept Amendment No. 16 to the ISO Tariff without modification (other than the non-substantive modification that the ISO has committed to make above) find the proposed GMC rate to be just and reasonable, and permit the proposed Tariff changes to go into effect upon the requested effective date without being subject to refund. In the alternative, if the filing is set for hearing and made subject to refund, the ISO requests that the Commission limit the scope of the hearing as discussed above and permit the ISO to surcharge other customers to recover refunded amounts.

Respectfully submitted,

N. Beth Emery
Vice President and General Counsel
Roger E. Smith
Regulatory Counsel
The California Independent System
Operator Corporation
151 Blue Ravine Road
Folsom, CA 95630

Edward Berlin
Kenneth G. Jaffe
Scott P. Klurfeld
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W.
Washington, D.C. 20007-5116
Attorneys for the California Independent
System Operator Corporation

Dated: June 4, 1999

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. on this 4th day of June, 1999.

Daniel Klein
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W.
Washington, D.C. 20007-5116
202/424-7500